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114TH CONGRESS
1st Session

SENATE

REPORT
114–148

A BILL TO REQUIRE THE SECRETARY OF VETERANS AFFAIRS TO REVOKE BONUSES PAID TO EMPLOYEES INVOLVED IN ELECTRONIC WAIT LIST MANIPULATIONS, AND FOR OTHER PURPOSES

SEPTEMBER 28, 2015.—Ordered to be printed

Mr. ISAKSON, from the Committee on Veterans' Affairs, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 627]

The Committee on Veterans' Affairs (hereinafter, "the Committee"), to which was referred the bill (S. 627), to amend title 38, United States Code (hereinafter, "U.S.C."), to prohibit awarding bonuses to employees of the Department of Veterans Affairs (hereinafter, "VA" or "Department") with respect to whom an adverse finding has been made by the Secretary, and for other purposes, having considered the same, reports favorably thereon with amendment and recommends that the bill, as amended, do pass.

INTRODUCTION

On March 3, 2015, Senator Kelly Ayotte introduced S. 627, a bill to require the Secretary of Veterans Affairs to revoke bonuses paid to employees involved in electronic wait list manipulations. Senators Crapo, Flake, Klobuchar, McCaskill, Moran, Shaheen, and Thune are original cosponsors. Senators Cassidy and Toomey were later added as cosponsors of the bill. The bill was referred to the Committee.

On June 3, 2015, Senator Bill Cassidy introduced S. 1496, the proposed Ensuring Department of Veterans Affairs Employee Accountability Act, which would require the Department of Veterans Affairs to retain a copy of any reprimand or admonishment received by an employee of the Department in the permanent record of the employee. The bill was referred to the Committee.

COMMITTEE HEARING

On May 13, 2015, the Committee held a hearing on pending benefits legislation. Testimony on S. 627 as introduced was offered by: David R. McLenachen, Acting Deputy Under Secretary for Disability Assistance, Department of Veterans Affairs; Anthony Kurta, Deputy Assistant Secretary of Defense, Military Personnel Policy, Department of Defense; Teresa W. Gerton, Deputy Assistant Secretary of Policy, Veterans' Employment and Training Service, Department of Labor; Alphonso Maldon, Jr., Chairman, Military Compensation and Retirement Modernization Commission; Jeffrey E. Phillips, Executive Director, Reserve Officers Association; and Aleks Morosky, Deputy Legislative Director, National Legislative Service, Veterans of Foreign Wars.

COMMITTEE MEETING

After carefully reviewing the testimony from the foregoing hearing, the Committee met in open session on July 22, 2015, to consider, among other legislation, an amended version of S. 627, consisting of provisions from S. 627 as introduced and S. 1496 and changes suggested during the testimony noted above. The Committee voted, by voice vote, to report favorably S. 627 as amended.

SUMMARY OF S. 627 AS REPORTED

S. 627, as reported (hereinafter, "the Committee bill"), consists of two sections, summarized below:

Section 1 would add a section to title 38, U.S.C., providing that, notwithstanding any other provision of law, in a case in which the Secretary of Veterans Affairs makes an adverse finding relating to a VA employee, the Secretary may not award a bonus to that employee until the earlier of:

1. The date 5 years after the end of the fiscal year in which the adverse finding was made; or
2. The date the finding is found to have been made in error.

Section 1 would provide authorization to the Secretary to base such an adverse finding on an investigation by, determination of, or information provided by the VA Inspector General or another senior ethics official from VA or the Comptroller General of the United States in connection with that official carrying out an official activity, authority, or function.

If the Secretary makes an adverse finding, the Secretary must, after notice and an opportunity for a hearing, issue an order directing the employee to repay the amount of any bonus awarded during the year during which the adverse finding is made, unless the finding is found to have been made in error.

For purposes of that authority, section 1 of the Committee bill would set forth the following definitions:

1. An "adverse finding" for these purposes would be defined to mean a determination that the conduct of the employee:
    a. Violated a VA policy for which the employee may be removed or suspended, or
    b. Violated a law for which the employee may be imprisoned for more than 1 year.

2. A "bonus" for these purposes would be defined to include an award under chapter 45 of title 5, U.S.C., an award under section 5384 of title 5, U.S.C., and a retention bonus under section 5754 of title 5, U.S.C.

Section 2 would add a section to title 38, U.S.C., providing that, if any VA employee receives a reprimand or admonishment, the Secretary must retain a copy of the reprimand or admonishment in the permanent record of the employee as long as the employee is employed by VA.

BACKGROUND AND DISCUSSION

Sec. 1. Prohibition on award of bonuses to employees subject to adverse findings.

Section 1 of the Committee bill, which is derived from S. 627 as introduced, would prohibit awarding bonuses to employees of the Department of Veterans Affairs with respect to whom an adverse finding has been made by the Secretary, by amending chapter 7 of title 38, U.S.C., by adding a new section, "Section 714. Prohibition on award of bonuses to employees subject of adverse findings."

Background. In spring 2014, reports revealed that not only were veterans waiting months to receive health care at the Phoenix VA Medical Center but VA employees were manipulating the medical appointment system to make it appear as though timely health care was being provided. The delay had huge implications in terms of the health of the veteran and negatively impacted timely care. Further, it exposed not just an isolated issue but systemic failures throughout the VA health care system.

In response to the scandal, Senator Ayotte introduced S. 627, bipartisan legislation aimed at improving accountability at VA. In a statement for the record before the Committee on May 13, 2015, Senator Ayotte stated, "To make matters worse, in the aftermath of the wait list scandal, the VA failed to sufficiently hold those who manipulated the wait lists responsible. It is outrageous that VA employees who deliberately manipulated wait lists receive bonus pay at taxpayers' expense."[1]

In 2013, according to VA, the Secretary issued $2,827,377 in bonuses to Senior Executive Service employees. VA based employee bonuses, among other factors, on wait time metrics thereby creating an incentive to misrepresent data in order to maximize one's bonus. Many of the employees that received performance awards were responsible for the negligence at Phoenix and other VA medical facilities around the country.

During the consideration of the Committee bill, Senator Cassidy stated,

> "Question: Why do we need this bill? When the VA scandal erupted in Phoenix last year, then-VA Secretary Eric Shinseki rescinded the performance award given in 2013 to the career Senior Executive who ran the VA's Phoenix Health Care System, a bonus that the Department said was awarded because of an administrative error. The employee appealed and a Federal judge directed the VA to

[1] Testimony of the Honorable Kelly Ayotte, during a hearing entitled, "Pending Benefits Legislation," before the Senate Committee on Veterans' Affairs, May 13, 2015.

repay the bonus, despite the fact that the employee had improperly accepted more than $13,000 in gifts from lobbyists and failed to report them and manipulated data to conceal excessive wait times for veterans seeking health care. The judge determined, however, that the VA did not have the authority to rescind her bonus.

"This is why people do not trust the VA. Here is a woman who, again, took $13,000 in gifts from lobbyists, did not report, and then manipulated data, and nonetheless she gets a bonus. Now, if we want to improve the VA system, we need to focus on the quality of the workforce, and workforce morale is seriously affected by those who have failed to do their jobs, yet nonetheless receive bonuses, or do not have information on reprimands retained in their permanent record." [2]

The problems that plague VA go beyond wait lists manipulation; therefore, the Committee bill prohibits the awarding of bonuses for any adverse finding relating to a VA employee. The Committee worked closely with Senator Ayotte to ensure a prospective solution to prevent VA from awarding bonuses to employees who are negligent in their duties. The Committee bill does not give the Secretary the authority to retroactively revoke bonuses but upon enactment of the legislation provides the authority to revoke bonuses from employees for which an adverse finding was made. The Committee believes that prospectively, if a VA employee undermines the mission of the Department and violates its policies then at the very least, the employee should be directed to repay the amount of the bonus he/she received. Malfeasance at VA cannot be tolerated, much less rewarded.

Committee Bill. Section 1 would add a section to title 38, U.S.C., providing that, notwithstanding any other provision of law, in a case in which the Secretary of Veterans Affairs makes an adverse finding relating to a VA employee, the Secretary may not award a bonus to that employee until the earlier of:

1. The date 5 years after the end of the fiscal year in which the adverse finding was made; or

2. The date the finding is found to have been made in error.

Section 1 would provide authorization to the Secretary to base such an adverse finding on an investigation by, determination of, or information provided by the VA Inspector General or another senior ethics official from VA or the Comptroller General of the United States in connection with that official carrying out an official activity, authority, or function.

If the Secretary makes an adverse finding, the Secretary must, after notice and an opportunity for a hearing, issue an order directing the employee to repay the amount of any bonus awarded during the year during which the adverse finding is made, unless the finding is found to have been made in error.

For purposes of that authority, section 1 of the Committee bill would set forth the following definitions:

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[2] Statement by the Honorable Bill Cassidy, during a business meeting entitled, "Business Meeting: Markup of Pending Legislation," before the Senate Committee on Veterans' Affairs, July 22, 2015.

1. An "adverse finding" for these purposes would be defined to mean a determination that the conduct of the employee:

a. Violated a VA policy for which the employee may be removed or suspended, or

b. Violated a law for which the employee may be imprisoned for more than 1 year.

2. A "bonus" for these purposes would be defined to include an award under chapter 45 of title 5, U.S.C., an award under section 5384 of title 5, U.S.C., and a retention bonus under section 5754 of title 5, U.S.C.

The Committee has heard from veterans, VA employees, and the American taxpayer on the need for employee accountability at VA. These are common sense solutions that should be enacted to protect taxpayer dollars from wasteful bonuses and put an end to the practice of rewarding bad behavior at VA.

Sec. 2. Retention of records of reprimands and admonishments received by employees of the Department of Veterans Affairs.

Section 2 of the Committee bill, which is derived from S. 1496, would require the Secretary to retain a copy of any reprimand or admonishment received by an employee of the Department in the permanent record of the employee, by amending chapter 7 of title 38, U.S.C., by adding a new section, "Section 715. Record of reprimands and admonishments."

Background. Federal agencies have a number of ways, including reprimands and admonishments, to address misconduct among their employees and ensure a high quality workforce. According to VA, a reprimand is a "written statement of censure given to an employee for misconduct" while an admonishment is a "written statement of censure given to an employee for a minor act of misconduct."[3] Under VA policy, if an employee receives a "reprimand" for a certain offense, it remains in his/her employee file for 3 years and, if an employee receives an "admonishment," it remains in his/her file for 2 years.[4] By only temporarily maintaining records of misconduct, it creates a blind spot for the Department and reduces its ability to hold employees accountable. The Committee bill is a common sense solution to ensure that complete records of offenses are kept and any continued pattern of misconduct is easily identifiable.

Committee Bill. Section 2 of the Committee bill would amend chapter 7 of title 38, U.S.C., to require the Secretary to retain any reprimand or admonishment received by an employee in his/her permanent record as long as the employee is employed by VA.

The Committee believes that maintaining a permanent record of a VA employee's previous misconduct serves as a powerful deterrence mechanism for future misconduct. Further, if an employee's misconduct warrants removal, a record may help to substantiate the case and increase accountability.

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[3] Department of Veterans Affairs, VA Handbook 5021, Employee/Management Relations, http://www1.va.gov/vapubs/viewPublication.asp?Pub_ID=778&FType=2

[4] VA Handbook 5021, http://www.va.gov/vapubs/viewPublication.asp?Pub_ID=686&FType=2

COMMITTEE BILL COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the Congressional Budget Office (hereinafter, "CBO"), estimates that enactment of S. 627 as amended would, relative to current law, not affect direct spending or revenues. Enactment of the Committee bill would not affect the budget of state, local, or tribal governments.

The cost estimate provided by CBO, setting forth a detailed breakdown of costs, follows:

CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 30, 2015.

Hon. JOHNNY ISAKSON,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 627, a bill to require the Secretary of Veterans Affairs to revoke bonuses paid to employees involved in electronic wait list manipulations, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dwayne M. Wright.

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 627—A bill to require the Secretary of Veterans Affairs to revoke bonuses paid to employees involved in electronic wait list manipulations, and for other purposes

S. 627 would prohibit the Department of Veterans Affairs (VA) from paying awards and bonuses to employees who have violated certain laws or VA policies. In addition, such employees would be required to repay any awards or bonuses received during a year in which VA makes a determination of such a violation.

The bill also would require VA to retain records of all admonishments and reprimands in employees' permanent records for the duration of their employment by the department. CBO estimates that implementing S. 627 would increase spending subject to appropriation by less than $500,000 over the 2016–2020 period; such spending would be subject to the availability of appropriated funds.

Enacting S. 627 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 627 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Dwayne M. Wright.

The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact that would be incurred in carrying out the Committee bill. The Committee finds that S. 627 would not entail any regulation of individuals or businesses or result in any impact on the personal privacy of any individuals and that the paperwork resulting from enactment would be minimal.

TABULATION OF VOTES CAST IN COMMITTEE

In compliance with paragraph 7(b) of rule XXVI of the Standing Rules of the Senate, the following is a tabulation of votes cast in person or by proxy by members of the Committee on Veterans' Affairs at its July 22, 2015, meeting. One amendment was offered by Senator Brown to modify the bonus prohibition language and strike the section on retaining reprimands. This amendment was not agreed to by a roll call vote.

Yeas	Senator	Nays
	Mr. Moran	X
	Mr. Boozman	X
	Mr. Heller	X
	Mr. Cassidy	X
	Mr. Rounds	X
	Mr. Tillis	X
	Mr. Sullivan	X
X	Mr. Blumenthal	
X	Mrs. Murray	
X	Mr. Sanders	
X	Mr. Brown	
X	Mr. Tester	
X	Ms. Hirono	
X	Mr. Manchin	
	Chairman Isakson	X
7	TALLY	8

On that date, the Committee voted by voice vote to order favorably reported with amendments S. 627, a bill to prohibit the Secretary of Veterans Affairs from awarding bonuses to employees of the Department of Veterans Affairs with respect to whom an adverse finding has been made by the Secretary, and for other purposes.

AGENCY REPORT

On May 13, 2015, David R. McLenachen, Acting Deputy Under Secretary for Disability Assistance, Veterans Benefits Administration, appeared before the Committee on Veterans' Affairs and submitted testimony on, among other things, S. 627. Excerpts from this statement are reprinted below:

PREPARED STATEMENT OF DAVID R. MCLENACHEN, ACTING DEPUTY UNDER SECRETARY FOR DISABILITY ASSISTANCE, U.S. DEPARTMENT OF VETERANS AFFAIRS

Chairman Isakson and Members of the Committee, thank you for the opportunity to present VA's views on several bills that are pending before the Committee. As you just mentioned, Mr. Chairman, I am accompanied by Ms. Szybala. She is our Assistant General Counsel. She will address any questions that you may have with regard to S. 627 on revocation of bonuses.

* * * * * * *

S. 627

S. 627 would require VA to identify VA employees who, during fiscal years 2011 through 2014, contributed to the purposeful omission of the name of one or more Veterans from a VA medical facility's electronic wait list or supervisors of these employees who knew or reasonably should have known about the employee's actions and received a "bonus" in part as a result of the purposeful omission. The bill would further require VA to identify these responsible individuals within 180 days after VA's Office of the Inspector General (OIG) submits a report to Congress about inappropriate scheduling practices at VA medical facilities, if such report is based on investigations carried out by the OIG in calendar year 2014. VA would also be required, after providing notice and an opportunity for a hearing, to order that these individuals repay bonuses that they received as a result of a purposeful omission. An individual who has been ordered to repay a bonus may appeal that order to the Merit Systems Protection Board (MSPB).

VA has numerous constitutional concerns about the bill, including concerns arising under the Fifth Amendment Takings Clause, the Due Process Clause, and the Ex Post Facto Clause. VA also has policy and procedural concerns about the bill. VA looks forward to working with the Committee in order to address these concerns.

S. 627 is a bill for which there is no precedent. No Federal agencies have the authority to require employees to repay past monetary performance awards or bonuses that were given in accordance with law and without conditions or contractual obligations. This legislation threatens a number of core constitutional rights related to property and due process that the Framers of the Constitution sought to protect,—and the bill would likely give rise to litigation. VA believes that employees should not be penalized by legislation that attaches new penalties on the basis of past behavior and transactions and should have protection from deprivation of life, liberty, or property without due process of law. Further, performance awards are intended to be a key tool in motivating employees to provide outstanding service to Veterans, and the value of that

tool should not be undermined by measures that would limit employee confidence in the performance award system. By singling out VA employees for punitive measures, the legislation would likely serve to demoralize a workforce dedicated to serving Veterans and hurt VA's efforts to recruit and retain high performing employees. VA is concerned that S. 627, if passed, would give rise to numerous lawsuits challenging the constitutionality of the provisions and VA's actions pursuant to it.

For these reasons, and as further explained in the below discussion, VA strongly opposes this legislation.

Implementing the bill, as written, would also be impractical for the government. First, the bill does not define the term "bonus" as a "performance award." In accordance with law, VA does not give "bonuses," but rather awards an employee based on his or her performance. Second, the type of hearing that needs to be provided to an employee before a repayment order must be issued is not specifically addressed in the bill. While the bill states that hearings "shall be conducted in accordance with regulations relating to hearings promulgated by the Secretary under chapter 75 of title 5, United States Code," chapter 75 references various types of hearings. Consequently, the type of hearing that would need to be provided is not addressed in the bill. Third, the bill raises a number of tax questions. For example, should the Department of Treasury treat a repayment of a performance award as adjustments to prior year compensation, even though the award may have been paid a number of years ago? This tax question, while not addressed in the bill, would have to be addressed.

As noted above, the bill would raise a number of constitutional issues. First, the bill may run afoul of the Fifth Amendment's Takings Clause by requiring employees to return property that was given to them unconditionally by the government. The Takings Clause prevents the government from "depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 266 (1994). In the case of an employee who has already been paid a bonus by the government, that bonus is the property of the employee. The taking would occur if the government collects the bonus or even a portion thereof without just compensation. See, e.g., *Nat'l Educ. Bd.* v. *Ret. Bd. of R.I.*, 172 F.3d 22, 30 (1st Cir. 1999) (the Takings Clause protects "[p]ension payments actually made to retirees").

The bill may have a "retroactive effect" by increasing an employee's liability for conduct that preceded the enactment of the bill. See *Landgraf*, 511 U.S. at 280 (a bill has a "retroactive effect" if it "increases a party's liability for past conduct"). "'The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.'" *Pension Ben. Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16–17 (1976)). Under the bill, an employee must repay a bonus based on conduct that preceded the enactment of the bill. Because the employee was not aware that he or she would have to repay the bonus at the time of the conduct, the bill may have a "retroactive effect" and may implicate the employees'

due process rights to fair notice. See *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 570 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

Finally, the legislation may raise constitutional Ex Post Facto Clause concerns. The Ex Post Facto Clause prohibits laws that "impose[ ] a punishment for an act which was not punishable at the time it was committed; or impose[ ] additional punishment to that then prescribed." *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325–26 (1867). In *Hiss* v. *Hampton*, 338 F. Supp. 1141, 1147–48 (D.D.C. 1972), a three judge panel in the U.S. District Court for the District of Columbia held that a law denying payment of pensions to former employees who falsely testified with respect to Government service was an ex post facto law as it pertained to the conduct of those employees which preceded the passage of the law. Id. at 1148. According to the court in *Hiss*, "[t]he proper function of [law] is to guide and control present and future conduct, not to penalize former employees for acts done long ago." Id. at 1148–49; see also *Peugh* v. *United States*, 133 S. Ct. 2072, 2085 (2013) (noting that "the [Ex Post Facto] Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action"). As currently drafted, the bill could potentially raise some of the same issues as the provision at issue in *Hiss*.

Based on the implementation concerns discussed above, VA is unable to determine the costs for this bill. It is important to note, however, that apart from costs to investigate and identify the employees, as required by the bill, VA would also have to expend significant resources to conduct a hearing prior to issuing a repayment order, defend its repayment order before the MSPB, and assist the Department of Justice in defending the order before the U.S. Court of Appeals for the Federal Circuit.

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MINORITY VIEWS OF HON. RICHARD BLUMENTHAL, RANKING MEMBER, HON. PATTY MURRAY, HON. BERNARD SANDERS, HON. SHERROD BROWN, HON. JON TESTER, AND HON. MAZIE K. HIRONO ON S. 627, AS REPORTED BY THE VETERANS' AFFAIRS COMMITTEE

On July 22, 2015, the Senate Committee on Veterans' Affairs (hereinafter, "the Committee") voted, by voice vote, to approve S. 627, as amended, a bill to prohibit awarding bonuses to employees of the Department of Veterans Affairs (hereinafter, "VA" or "Department") subject to adverse findings (hereinafter, "S. 627"). We fully support bringing greater accountability to VA, and that includes ensuring that an employee does not receive a bonus as a result of misconduct. We have concerns, however, with S. 627 as reported out of Committee, which we will outline in these supplemental views.

Section 1(a)(1) of S. 627 would provide that in a case in which the VA "Secretary makes an adverse finding relating to an employee of the Department, the Secretary may not award a bonus" to a VA employee. Section 1(a)(2) of S. 627 would provide that the Secretary of Veterans Affairs "may" base an "adverse finding" on an investigation by, a determination of, or information provided by the VA Office of the Inspector General, a senior VA ethics official, or the Comptroller General of the United States. We are concerned that section 1 of S. 627 does not require the Secretary to base an adverse finding on the determination of an independent decisionmaker. Moreover, S. 627's definition of "adverse finding" includes conduct inconsistent with "a policy of the Department for which the employee may be removed or suspended." We are concerned that this definition is vague and could lead to abuse. To cure these two defects, Senator Brown offered an amendment during the Committee's July 22, 2015 business meeting. Senator Brown's amendment, which was supported by all the Minority Members of the Committee, would set appropriate limits on section 1 of S. 627 by requiring that the Secretary base an adverse finding on the determination of an independent decisionmaker and by requiring that an independent decisionmaker also determine whether the employee violated a policy of the Department. These two technical corrections would ensure that bonus bans are not arbitrarily imposed by VA managers. Unfortunately, the Brown amendment was rejected.

In addition to setting appropriate limits to section 1 of S. 627, the Brown amendment would have struck section 2 of S. 627. Section 2 of S. 627 would require VA to retain a copy of admonishment or reprimand by a VA employee in the employee's permanent record as long as the employee is employed by VA. Currently, letters of reprimand and admonishment are only held in a VA employee's record for a limited time: letters of admonishment nor-

mally remain in an employee's Official Personnel File (hereinafter, "OPF") for two years, and letters of reprimand normally remain in the employee's OPF for three years.[1] In testimony before the House Committee of Veterans' Affairs, VA noted that it is the standard practice across the Federal Government, including the Department of Defense, for letters of reprimand and/or admonishment to be retained on a time-limited basis.[2] According to VA, making letters of reprimand or admonishment permanent would prevent VA managers from "settling workplace grievances with employees with terms that would limit the amount of time these documents remain in the employee's permanent record," and it would restrict VA managers from removing these documents as a "term of settlement."[3] Both of these tools are frequently used by VA managers to "resolve complaints before they go into costly and high-risk" litigation.[4] These tools also allow VA managers to promote good performance of employees "because they are usually conditioned upon no further misconduct of the type that initially led to the reprimand or admonishment."[5] Moreover, making letters of reprimand or admonishment permanent in an employee's OPF may:

> " * * * have an unintended chilling effect on managers who, when faced with a decision to issue a letter of admonishment or reprimand for a minor infraction or to let the matter drop with just an oral warning, may elect to choose the lesser action in order to avoid leaving the employee with a permanent stain on his or her record."[6]

Besides the substantive issues with the provision that we have identified, section 2 of S. 627 was derived from S. 1496, a bill that has not been considered in a legislative hearing. For a significant and controversial provision like section 2 of S. 627, the Committee should have held a legislative hearing to give all Members the opportunity to hear from witnesses and fully understand the consequences of this provision.

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[1] See testimony of Robert Worley, Director, Education Service, Veterans Benefits Administration, during a legislative hearing before the Subcommittee on Economic Opportunity of the House Committee of Veterans Affairs, March 24, 2015, available at http://veterans.house.gov/sites/republicans.veterans.house.gov/files/Testimony%20WorleyIIUSAFR.pdf

[2] Id.

[3] Id.

[4] Id.

[5] Id.

[6] Id.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

Title 38. Veterans' Benefits

* * * * * * *

Part I. General Provisions

* * * * * * *

Chapter 7. Employees

Sec.

701. Placement of employees in military installations.

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[712. Repealed.]

713. Senior executives: removal based on performance or misconduct.

714. Prohibition on award of bonuses to employees subject of adverse findings.

715. Record of reprimands and admonishments.

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SEC. 714. PROHIBITION ON AWARD OF BONUSES TO EMPLOYEES SUBJECT OF ADVERSE FINDINGS

(a) PROHIBITION.—(1) Notwithstanding any other provision of law, in a case in which the Secretary makes an adverse finding relating to an employee of the Department, the Secretary may not award a bonus to such employee until the earlier of—

(A) the date that is five years after the end of the fiscal year in which the adverse finding was made; or

(B) the date that the finding is found to have been made in error.

(2) The Secretary may base an adverse finding under paragraph (1) on an investigation by, determination of, or information provided by the Inspector General of the Department or another senior ethics official of the Department or the Comptroller General of the United States in connection with the carrying out by such official of an activity, authority, or function under a provision of law other than this section.

(b) PREVIOUSLY AWARDED BONUSES.—If the Secretary makes an adverse finding relating to an employee under subsection (a), the

Secretary, after notice and an opportunity for a hearing, shall issue an order directing the employee to repay the amount of any bonus awarded to the employee during the year during which the adverse finding is made, unless such finding is found to have been made in error.

(c) DEFINITIONS.—In this section:

(1) The term "adverse finding" relating to an employee means a determination that the conduct of the employee—

(A) violated a policy of the Department for which the employee may be removed or suspended; or

(B) violated a law for which the employee may be imprisoned for more than 1 year.

(2) The term "bonus" means any bonus or cash award, including—

(A) an award under chapter 45 of title 5;

(B) an award under section 5384 of such title; and

(C) a retention bonus under section 5754 of such title.

SEC. 715. RECORD OF REPRIMANDS AND ADMONISHMENTS

If any employee of the Department receives a reprimand or admonishment, the Secretary shall retain a copy of such reprimand or admonishment in the permanent record of the employee as long as the employee is employed by the Department.

○